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LCJ: A Partnership For Civil Justice Reform

The Editor interviews Greg Lederer, President, and Lewis Collins, President-Elect, Lawyers for Civil Justice.

Editor: What are some of LCJ's priorities during the 2008-2009 year?

Lederer: LCJ has been at the vanguard of civil justice reform for over 20 years and has a proven record of success in leveling the playing field for corporations and their insurers in civil actions. LCJ is shaped by a unique partnership of corporate and private practice defense counsel that is devoted to accomplishing civil justice reform and providing a counterbalance to the organized plaintiffs' bar. Working closely with the corporate community and other civil justice reform organizations, LCJ serves as a catalyst for galvanizing corporate and defense bar

support for legislative and judicial rule making to ensure a fairer and balanced civil justice system. Our goals include preserving the availability of protective orders and confidentiality agreements in maintaining the security of a business' proprietary or sensitive information; enacting fair and reasonable e-discovery reforms to relieve businesses from the expense and burden associated with the discovery of electronic evidence; scrutinizing the admission of expert evidence to keep flawed and misleading "junk science" out of the courtroom, and initiating procedural rules reforms which will provide judges with the tools necessary to terminate early those lawsuits that have no merit.

Editor: How does LCJ generate sup-

port for its program throughout the defense bar?

Collins: In addition to the support of *Fortune* 500 corporations, LCJ is strongly supported by its founding defense bar organizations: the DRI, Federation of Defense & Corporate Counsel and the International Association of Defense Counsel as well as 65 law firms nationwide. However the defense organizations play a vital role in determining the agenda of LCJ and in generating individual attorneys to advocate and testify on our behalf. In this way, LCJ policy positions reflect the coordinated support of all the major national defense organizations and galvanize the support of their respective memberships.

LCJ corporate members meet twice yearly with the associate law firm mem-

bers and defense bar leaders. During these meetings, the LCJ determines its priorities for the year, both federally and at the state level, and focuses on developing a legislative and judicial rule making program to support the initiatives that are contemplated throughout the year. LCJ has traditionally attracted a wide array of policymakers to its meetings including several federal and state judges, Congressional leaders and representatives of the Executive Branch. For example, two years ago, the Department of Justice chose the LCJ meeting to announce what was then known as the McNulty Memo on attorney-client privilege. Also, former House Judiciary Committee chair Jim Sensenbrenner chose the LCJ meeting to challenge the defense bar to provide input on a new procedural rule which would clarify the laws pertaining to inadvertent disclosure of privileged information. By the way, this new rule, Federal Rule of Evidence 502, was recently signed into law by President Bush. So our meetings are very thought-provoking and content rich.

Editor: The protective orders issue has been a top issue for LCJ for many years. What should we expect in the coming months?

Lederer: We expect a renewed effort in the Democratic-controlled Congress to pass anti-protective orders legislation next year, and of course this type of legislation has long been opposed by LCJ. Shortly after the so called “Sunshine in Litigation” Bill was approved by the Senate Judiciary Committee, the House version was introduced in April by Congressmen Wexler and Nadler, despite strong objections by LCJ and the legal community. The House and Senate versions of the bill threaten the fundamental rights of litigants to privacy and property. It would also impose substantially burdensome regulatory responsibilities upon the courts while restricting judicial discretion to issue protective and sealing orders. LCJ plans to increase awareness about the damaging effects of these bills. LCJ recently arranged for one of its members to give testimony at a hearing before Senator Kohl’s Judiciary subcommittee. We have also submitted written testimony to other subcommittees and LCJ is currently organizing visits with key Members of Congress to inform them of the dangers of this bill.

Editor: What is LCJ’s role with respect to proposed Rule 56 and 26?

Collins: We are concerned that summary judgment remains an underutilized tool to screen out meritless cases. There are two remaining hearings that will be held on the proposed amendments, one on January 14, 2009 and on February 2, 2009. LCJ had previously submitted comments on Summary Judgment to the Rules Committee prior to its conference and meeting in January 2008 and to the Advisory Committee for its April 2008 meeting. Those comments, as well as the comments LCJ members are generating, advocate the inclusion of the mandatory nature of summary judgment. Generally we believe the claims should be identified and resolved at the earliest possible time. All too often, rulings on motions for summary judgment are deferred until trial or not ruled on at all. LCJ also advocates a bright line rule for protecting attorney-expert communications in connection with the expert discovery amendments.

Editor: How can readers find out more about the current proposals and when comments are due? Can they testify on these issues?

Lederer: Comments on the amendments may be submitted at any time up until February 17, 2009. There are three hearings scheduled on the proposed rule. It is urgent that written requests to testify be submitted to the Judicial Conference Rules Committee as soon as possible. We need as many people – corporate and defense counsel – as possible to sign up for these hearings!

The first public hearing on the proposed amendments will be held on Monday, November 17, 2008 beginning at 8:30 am in the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington DC. The next hearing will be in San Antonio, Texas, on January 14, 2009, and the third in San Francisco, California, on February 2, 2009.

The Request for Comment and all information from the Rules Committee regarding the proposed amendments to both Rule 56 (summary judgment) and Rule 26 (expert discovery) can be found at <http://www.uscourts.gov/rules/newrules1.htm>. That link should take you to the Rules Published for Comment

page, where you should click on Memorandum to the Bench, Bar, and Public on Proposed Amendments to the Federal Rules August 2008 (PDF) and Report of the Advisory Committee on Civil Rule May 2008 (PDF).

To submit comments and sign up for hearings click on to the U.S. Courts link above and scroll to the “Submit comments electronically via e-mail” link. Requests to testify can be made via e-mail on the message screen as simply as follows: “This will request permission to testify on the proposed amendments to Civil Rules 26 and 56 at the hearing on [November 17, 2008 in Washington, DC].” Written comments may also be submitted via the same or a separate e-mail either in the body of the email or more formally by attaching a PDF.

The Rules Committee would prefer that parties requesting an opportunity to testify at one of the hearings do so 30 DAYS IN ADVANCE of the hearing. However, the Committee usually holds open the rolls until at least a week before each hearing, so sign up as soon as you can. Written comments are preferred as soon as possible, but the absolute deadline is February 17, 2009 and those who are testifying should submit at least a summary of their remarks the week before the hearing.

Editor: How is LCJ trying to curb “junk science” in the courtroom?

Collins: LCJ has long advocated *Daubert* type standards, which emphasize the need for judges to act as “gatekeepers” in order to eliminate “junk science” from the courtroom. After conducting a nationwide poll of defense counsel to determine where the appropriate rule making opportunities exist, we established action teams in key states to support improved expert testimony rule reform. LCJ has also organized members in these key states to publish scholarly articles on the virtue of *Daubert* style gatekeeper functions. Additionally, LCJ provides these action teams with draft model legislation, position papers, and other resources in order to improve the quality of expert testimony in the courtroom. LCJ is currently overseeing state legislative and rule-making action in many states.

Editor: What has LCJ done to change the e-discovery process?

Lederer: LCJ realized that the corporate community was becoming overwhelmed with electronic discovery requests. The time, expense and burden of these discovery demands were substantially increasing the cost of litigation with the result that discovery was becoming the focal point of many cases. LCJ heard the voices of its corporate and defense counsel members and acted.

I am happy to say that LCJ successfully led the defense community's campaign to amend the Federal Rules of Civil Procedure, thereby dramatically reducing the tremendous burdens, expense and risks associated with discovery of electronic information. We were thrilled when e-discovery amendments advocated by LCJ were approved by the Federal Judicial Conference and promulgated by the U.S. Supreme Court.

Collins: The job, however, is not done. Each state is considering the enactment of its own electronic discovery rules. In response, LCJ is now working at the state level with local action teams set up to ensure that new state rules mirror (and in some case improve upon) these newly enacted federal rules.

Editor: Do you find that state e-discovery rules mirror the federal rules?

Lederer: According to LCJ E-Discovery Committee co-chair Tom Allman, fifteen states – Arizona, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Montana, New Hampshire, Nebraska, New Jersey, North Dakota, Ohio and Utah – have enacted e-discovery provisions in their civil rules, thereby joining Texas and Mississippi, which acted before the Federal Amendments of 2006 were drafted. In most cases, the amendments mirror the provisions of the Federal Amendments in whole or major part.

Collins: Our program is focused on other states where either action to amend the rules is underway or contemplated. We provide local “action teams” with the resources they need to “grow” these rules locally. The resources we provide include model legislation or rules, background papers and analyses of the rules and scholarship which has been helpful to our action teams in other states. Our positions reflect a tremendous amount of legal scholarship and analyses that has taken place over several years and it reflects the viewpoints of many different individuals who participate on LCJ E-Discovery Committee which meets monthly by conference call and sometimes in person.

We encourage defense attorneys who

are in our target states to work with us on an ongoing basis. Target states currently include New York, Connecticut, Tennessee, and Illinois among others.

Editor: How many members are involved with the Lawyers for Civil Justice?

Lederer: The LCJ network consists of major corporations, the leadership of the DRI, Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel. Collectively these organizations and the law firms that comprise our Associate Members represent over 40,000 private practice lawyers. Through the combined efforts of LCJ and its defense bar organizations, LCJ is able to rapidly respond with grass roots efforts in all 50 states and on the national level. The contacts that have been developed in state governments, rule making committees (on the state and federal level) and in Congress, have enabled LCJ to leverage its influence in a way that has led to the successes we have highlighted in this interview. As LCJ looks forward to challenging times, it will continue to serve as the catalyst for change and will work to keep our civil justice system balanced. I firmly believe LCJ is up to this challenge.